63 FLRA No. 120

UNITED STATES DEPARTMENT OF THE NAVY
NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
(Respondent/Agency)

and

INTERNATIONAL FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 22
(Charging Party/Union)

AT-CA-04-0318

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DECISION AND ORDER

May 29, 2009

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Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally implementing a new instruction that changed how Selection Advisory Boards (SABs) are used to fill vacancies without negotiating with the Union to the extent required by the Statute. The Judge found that the Respondent violated the Statute, as alleged, and ordered the Respondent to rescind the implemented instruction, reinstate the prior instruction, and bargain with the Union to the extent required by the Statute concerning any proposed changes in SAB procedures.

For the reasons that follow, we deny the Respondent's exceptions.

II. Background and Judge's Decision

SABs are three or five-person panels that the Respondent uses to fill vacancies. SABs rate applicants based on criteria established by the selecting official and submit lists of recommended applicants to the selecting official who retains the right to select any applicant, even one not recommended by the SAB. *See* Judge's Decision at 2-3.

Prior to 2003, Article 16 of the parties' collective bargaining agreement (CBA) provided that SAB procedures were set forth in Agency Instruction 12000.1. That instruction "provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow." *Id*. at 3. In particular, that instruction permitted the Union to nominate employees to SABs and required SABs to be used to fill permanent vacancies at the GS-07 level and above. *Id*. at 3, 13.

During negotiations for a new CBA (2003 CBA), the Union and the Respondent agreed on SAB language concerning the application of Agency Instruction 12000.1. The Agency head rejected the SAB provision on the ground that it was contrary to management's right to fill positions, make selections for appointments, and assign work under § 7106(a) of the Statute. *Id.* at 4-5; Tr. at 179. The parties decided to approve the 2003 CBA without the SAB language and agreed to discuss the possibility of addressing the issue in a separate agreement. However, the Respondent ultimately determined that addressing the SAB procedures in a separate memorandum of understanding (MOU) would be just as inappropriate as doing so in the CBA. *Id.* at 4-5. Shortly thereafter, the Respondent informed the Union that it intended to change the SAB procedures. In response, the Union submitted a written proposal containing SAB procedures similar to the prior SAB instruction. *See* GC Ex. 3, "IFPTE Local 22's Proposal." Specifically, the proposal required, among other things, that the Respondent appoint the Union's nominees to SABs, and that SABs be used to fill vacancies at the GS-07 level and above.

The parties met on three occasions concerning the proposed revisions to the SAB procedures, but did not reach agreement. Several months after the third meeting, the Respondent submitted to the Union its "final version" of the new SAB instruction, which was scheduled to be implemented five days later. Judge's Decision at 7. That final version of the SAB instruction provided that the Union would have the opportunity to submit to the Respondent a list of bargaining unit employees willing to participate on the SABs on a quarterly basis, from which the Respondent would have the option (but would not be required) to select SAB participants. *Id.* at 14; s*ee also* GC Ex. 4, "Notice of Proposed Change to Selection Advisory Boards Procedures." The final instruction also mandated that SABs be used to fill vacancies starting at the GS-13

level. *Id.* at 15; *see also* GC Ex. 4, "Notice of Proposed Change to Selection Advisory Boards Procedures."

The Union informed the Respondent that negotiations had not even begun and that it did not agree with this version of the proposal and "wouldn't sign it." Judge's Decision at 7. The Respondent responded that the proposal was its "final offer" and suggested that the Union pursue recourse through mediation or the Federal Service Impasses Panel (Panel) if it did not agree with the proposal. *Id*. Instead, the Union filed a ULP charge, and the GC issued a complaint alleging that the Respondent had violated § 7116(a)(1) and (5) of the Statute by implementing the instruction without negotiating to the extent required by the Statute. *See* GC Ex. 1(b).

Initially, the Judge rejected the Respondent's argument that the complaint is barred by § 7116(d) of the Statute because the unfair labor practice charge challenges the exact same SAB provision that the Union had contested in an earlier ULP charge and a grievance that it had previously lost at arbitration. [1] In this regard, the Judge found that the action before him was based on the 2003 CBA and addressed the Respondent's discussions with the Union between October 2003 and March 2004 regarding the new SAB provision, whereas previous cases dealt with the preceding CBA and the Respondent's actions regarding the convening of the SABs in August and October 2002. Judge's Decision at 11.

The Judge also rejected, as relevant here, the Respondent's argument that it had no duty to bargain because the SAB procedures were "covered by" Article 16 of the 2003 CBA. In this respect, the Judge determined that the SAB language sought by the Union in the 2003 CBA, which was similar to that encompassed in the previous CBA, was rejected by the Agency head and excluded from the final 2003 CBA. *Id.* at 8, 11. As such, the Judge concluded that "it is inappropriate to argue now that [the 2003 CBA] 'covers' the issue of SABs, either expressly or impliedly, or that the issue of SABs is 'inseparably bound up with' the language in Article 16 of the new CBA." *Id.* at 11 (citing *United States Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*HHS, SSA, Balt.*)). Specifically, the Judge found that the provisions set forth in Article 16 were not "inseparable" from the Respondent's system for convening SABs and that no agreement outside of the 2003 CBA was negotiated to cover the SABs. *Id.* at 8, 11-12. As such, the Judge found that the Union did not "waive its right to negotiate" over the SAB procedures because the procedures had already been addressed in negotiations over the 2003 CBA. *Id.* Rather, the Judge found that "the Union never abandoned its effort to negotiate specific rules for the conduct of SABs," but, instead, agreed to defer the issue to be addressed in a separate instruction. *Id.* at 12.

With respect to the Respondent's argument that it had no duty to bargain because the Union's proposal regarding the use of SABs was nonnegotiable, the Judge concluded that the proposal requiring the use of SABs in the hiring process for specific positions, i.e., for those positions at the GS-07 level and above, "do not interfere with a management right and are fully negotiable." *Id*. at 19 (citing *NFFE, Local 2099*, 35 FLRA 362 (1990) (*Local 2099*)). In terms of any negotiation that took place with regard to the proposal addressing the positions for which SABs would be used, the Judge found that, "[w]hile the [Respondent] told the Union at the bargaining sessions that the current practice was too time-consuming, there is no evidence in the record that the parties actually discussed whether each of their concerns could be accommodated by compromising on the range of the positions requiring SABs." *Id.* The Judge concluded that the Respondent "simply declared the issue nonnegotiable," and ultimately implemented its original proposal on the Union, "which the Union president estimated eliminated 90 percent of his unit's employees from SABs." *Id.* at 19-20 (citing Tr. at 31-32).

In addition, the Judge found that the Union had submitted other proposals that were not properly addressed by the Respondent, and determined that "[t]he Agency . . . seem[ed] to have concluded that management's rejection of a Union proposal was tantamount to the issue being resolved." *Id.* at 15-16. In this respect, with regard to the Union's proposal requiring the Union's participation on SABs, the Judge stated that the Authority has found that these types of proposals "may . . . 'under certain circumstances,' be negotiable as an appropriate arrangement under [§] 7106(b)(3)." *Id.* at 18 (quoting *AFGE, Local 1815*, 53 FLRA 606, 615 (1997) (*Local 1815*)). With respect to the Union's proposal that the Agency remove the cover sheets from promotion applications, the Judge found that the Agency simply responded that it could not remove the cover

1. 5 U.S.C. § 7116(d) states, in pertinent part:

Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under

§ 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

sheets because "this was handled by a different office and the cover sheet merged with the first page of the application itself." *Id*. at 6 (citing Tr. at 115, 161-62). Ultimately, the Judge found that the Respondent's "continued, and improper, assertion of non-negotiability to a large portion of the Union's proposals, interfered significantly with the bargaining process and precluded a proper discussion of the issues facing the parties." *Id*. at 20. Thus, the Judge determined that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain in good faith with the Union. Specifically, the Judge found that the Respondent improperly restricted and prematurely terminated bargaining and implemented the new SAB instruction before the parties had reached impasse.

After considering the guidelines that the Authority considers when an agency has failed to bargain over the impact and implementation of a management decision, the Judge ordered a *status quo ante* remedy. In this regard, the Judge analyzed the five factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*), finding that: (1) the Respondent provided adequate notice to the Union of its proposed change; (2) the Union requested bargaining; (3) the Respondent's bargaining misconduct was willful; (4) the benefit of using SABs to fill vacancies outweighs the burden on the Respondent to hold a high number of SABs; and (5) the resumption of the old SAB procedures, at least for the duration of good faith bargaining, would not significantly disrupt the Respondent's operations. The Judge concluded that the *FCI* factors weighed in favor of imposing a *status quo ante* remedy and ordered the Respondent to utilize the pre-2004 SAB instruction until it has completed good faith bargaining on a revised instruction.

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent argues that it has no statutory duty to bargain with the Union because the SAB procedures are "covered by" the 2003 CBA. Exceptions at 2. Specifically, the Respondent claims that "SABs are clearly 'inseparably bound up with' Article 16, 'Filling Manpower Requirements'" because the previous CBA addressed SABs in Article 16, and the 2003 CBA, while not addressing SABs, addresses issues with regard to 'Filling Manpower Requirements.' *Id.* According to the Respondent, "[t]his case is clearly dealing with 'filling manpower requirements' through merit staffing, since the employees impacted by [SAB] procedures are current bargaining unit employees applying for vacant positions through the merit staffing program." *Id.* at 3. The Respondent further claims that, since the parties discussed the SAB procedures when negotiating Article 16 of the 2003 CBA, "[t]he Union clearly should have contemplated that the negotiated provisions would foreclose further bargaining on the procedures used in filling manpower requirements, including merit staffing." *Id* at 7. In addition, the Respondent alleges that the parties "did not agree that the issue would be bargained at a later date" and as such, it "had no obligation to continue bargaining over procedures and appropriate arrangements related to hiring." *Id.*

In addition, the Respondent contends that the Judge erred in determining that it failed to bargain in good faith to the extent required by the Statute. In this respect, the Respondent argues that it fulfilled its bargaining obligations under the Statute because the Union, after being informed by the Respondent that its proposal was nonnegotiable, did not request an allegation of nonnegotiability, submit a negotiable proposal, or suggest any compromise language varying from the prior SAB procedure. According to the Respondent, the Union's position that it should have "an absolute right to appoint people to SABs, regardless of the circumstances" violates management's right to select under § 7106 of the Statute. *Id.* at 14. The Respondent claims that the Union never submitted a negotiable proposal during the impact and implementation bargaining and the Judge improperly made a negotiability determination without considering the actual language of the Union's proposal. *Id.* at 14, 17-18. The Respondent also argues that "the ALJ erred when he essentially decided that the union proposal was negotiable in its entirety without severing that portion of the union proposal that was negotiable as an appropriate arrangement[,]" which it claims is inconsistent with *Local 1815* "and its progeny." *Id.* at 16.

In addition, the Respondent alleges that it fulfilled its bargaining obligation specifically with regard to the Union's proposal requiring that SABs be used for filling vacancies starting at the GS-07 level, even though its chief negotiator contended throughout the SAB discussions that this proposal was nonnegotiable. *Id*. at 15. In support, the Respondent cites *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 16 FLRA 217 (1984) (*SSA, Balt.*), stating that, the employer in that case had bargained in good faith when it "met with the union five times, rejected the union's proposals, explained the reasons for the rejection, and ultimately implemented its relocation plan upon impasse." *Id.* at 15. As such, the Respondent maintains that its implementation of the SAB instruction was lawful.

Finally, the Respondent contends that the Judge erroneously ordered a *status quo ante* remedy. The Respondent argues that the Judge erred in determining that the Respondent was "guilty of willful bargaining misconduct" because the Judge "never considered the negotiability of an actual proposal from the Union." *Id.* at 17. In this regard, the Respondent claims that the Union never actually presented a negotiable proposal over which to bargain. *Id.* at 17-18. In addition, the Respondent contends that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations because the Respondent "would be forced to return to a procedure that was specifically found to interfere with management's rights[.]" *Id.* at 18.

B. GC's Opposition

The GC argues that the Judge correctly determined that the SAB procedures are not "covered by" the 2003 CBA for two reasons: (1) SABs are not addressed in the 2003 CBA nor in any other "side agreement"; and (2) "the parties could not have reasonably contemplated that their discussions[,] [which did not result in any type of agreement,] would foreclose further bargaining[.]" Opposition at 10-11. To the contrary, the GC contends that "the parties had a verbal agreement to get back together regarding the SAB procedure when it came up for renegotiation[.]" *Id.* at 11. As such, the GC claims that the Respondent "has waived any right to raise the 'covered by' defense." *Id.*

The GC also argues that the Union did not waive its right to bargain over the SAB procedures, as "a waiver of any bargaining rights must be clear and unmistakable." *Id.* (citing *IRS,* 29 FLRA 162, 166 (1987)). In this regard, the GC claims that the record reflects that "the Union never abandoned its effort to negotiate the specific rules applicable to the conduct of the SABs[,]" but rather, that the parties had agreed to return to the bargaining table to incorporate the SAB language into an MOU. *Id.* at 11-12. According to the GC, once the parties realized that the Agency head would have to approve the MOU like it did the 2003 CBA, they decided to wait and negotiate over the SABs when the revised SAB instruction was presented to the Union. *Id.* Consequently, the GC argues that the Union did not waive its bargaining rights with respect to the SABs.

In addition, the GC contends that the Respondent failed to bargain over the proposed changes to the SAB procedures to the extent required by the Statute. *Id.* at 13-14. The GC claims that the Judge correctly found that requiring union participation on rating panels may be negotiable as an appropriate arrangement in order to prevent unfair or inaccurate ratings. *Id.* at 15. In this regard, the GC asserts that the Judge properly found that the Respondent made no attempt to craft a proposal pertaining to Union participation on the SABs that would address the concerns of employees adversely affected by management's right to select. *Id.* The GC also argues that the Judge correctly found that there is no evidence to support the Respondent's claim that using SABs to hire at the GS-07 level and above is too time consuming. *Id.* As such, the GC contends that the Judge properly found that, in declaring the matter to be nonnegotiable, the Respondent "significantly interfered with the bargaining process[.]" *Id.* at 16.

Lastly, the GC claims that the Judge properly ordered a *status quo ante* remedy. In this regard, the GC argues that the Respondent's bargaining misconduct was willful because it: (1) did not give the Union meaningful feedback during negotiations; (2) claimed that there was an agreement regarding the new SAB instruction even though the parties had not agreed on specific language; and (3) ceased bargaining once the Union would not approve the new SAB instruction which contained revisions that it had not seen before. *Id.* at 16. The GC also contends that the Respondent does not provide sufficient evidence to support its argument that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations.

IV. Analysis and Conclusions

A. The Judge did not err in rejecting the Respondent's argument that the SAB issue is "covered by" the 2003 CBA.

The Authority has held that, absent a reopener clause, parties are not permitted to demand mid-term bargaining over matters that are covered by an agreement. *See, e.g., United States Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 72 (2004) (citing *HHS, SSA*, *Balt.,* 47 FLRA at 1013). A subject matter for negotiation is covered by a collective bargaining agreement if the matter is expressly contained in the agreement. *HHS, SSA*, *Balt.,* 47 FLRA at 1018. If the agreement does not expressly contain the matter, then the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Id.* Consideration of the parties' bargaining history is an "integral component" of this determination. *United States Customs Serv., Customs Mgt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Moreover, the Authority has held that, where a judge's interpretation of the meaning of the parties' agreement is challenged, it will determine whether the judge's

interpretation is supported by the record and by the standards and principles applied by arbitrators and the federal courts. *IRS, Wash., D.C.*, 47 FLRA 1091, 1110-11 (1993).

The Respondent argues that it has no statutory duty to bargain with the Union because the SAB procedures are "covered by" the 2003 CBA. Exceptions at 2. However, the 2003 CBA does not expressly or impliedly address the SABs. Prior to 2003, Article 16 of the parties' CBA specified that SAB procedures were governed by Agency Instruction 12000.1, which "provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow." Judge's Decision at 3. The 2003 CBA makes no mention of the SABs. During the 2003 CBA negotiations, the parties agreed to SAB language concerning the application of Agency Instruction 12000.1, but that provision was rejected by the Agency head on the ground that it was contrary to management's right to fill positions and to make selections for appointments. The 2003 CBA was subsequently approved without the SAB language. Even though the parties discussed addressing the SAB issue in a separate agreement, the Respondent argued that including the SAB language in a separate agreement would also be inappropriate. *Id.* at 4-5. Based on these facts, the Judge properly found that the 2003 CBA was not intended to cover the SAB procedures.

The Respondent further claims that, since the parties discussed the SAB procedures when negotiating Article 16 of the 2003 CBA, further bargaining regarding such procedures is foreclosed because the subject is "inseparably bound up with, and plainly an aspect of, a subject matter contained in an agreement[.]" *Id.* at 3 (citing *HHS, SSA, Balt.,* 47 FLRA at 1018). Since the Agency head rejected the language that directly addressed the SAB procedures in the 2003 CBA, and the parties were unable to agree upon a separate agreement that included SAB language, we conclude that Article 16, "Filling Manpower Requirements," was not intended to cover the SAB procedures. Accordingly, we find that the SAB procedures are not "inseparably bound up with" Article 16 and that the SAB issues are not "covered by" the 2003 CBA. As such, we deny the Respondent's exception.

B. The Judge did not err in finding that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain over the implementation of the new SAB instruction.

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.,* 55 FLRA 848, 852 (1999) (*FCI, Bastrop*). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. *See Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 405-06 (1986).

If an agency has an obligation to bargain, then it can satisfy that obligation by reaching agreement with the union, or by bargaining in good faith to impasse over negotiable proposals submitted by the union. *Pension Benefit Guar. Corp.,* 59 FLRA 48, 50 (2003) (*PBGC*) (Member Pope dissenting, in part, as to another matter) (citation omitted). This obligation to bargain is predicated on the union's submission of negotiable proposals. *Id.* An agency may refuse to bargain where it contends that the proposals submitted by the union are nonnegotiable. *See id.* (citing *United States Dep't of HUD*, 58 FLRA 33 (2002)). However, the agency acts at its peril if it then implements the proposed change in conditions of employment. *See, e.g., PBGC*, 59 FLRA at 50; *United States Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991). If all pending union proposals are found to be nonnegotiable, then the agency will not be found to have violated the Statute by implementing the change without bargaining over it. *PBGC*, 59 FLRA at 50. If any pending union proposals are found to be negotiable, then the agency will be found to have violated the Statute by implementing the change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *Id.* (citing *FCI, Bastrop,* 55 FLRA at 852).

In sum, to determine whether the agency committed a ULP by failing to bargain prior to making a change in conditions of employment, the first inquiry is whether the agency had an obligation to bargain at all under the circumstances. *Id.* at 50-51. If it did, then the next inquiry -- whether the agency satisfied its bargaining obligation -- may focus on the negotiability of the union's proposals and the agency's response to those proposals. *Id.* at 51; *see also United States Dep't of HHS, SSA, Balt., Md.,* 36 FLRA 655, 669 (1990) (where respondent's defense to a ULP complaint rests on its contention that a particular proposal is nonnegotiable,

resolution of the negotiability dispute is necessary to determine whether a ULP has been committed).

As to the first inquiry -- whether the Respondent had an obligation to bargain -- the Judge did not determine whether the Respondent had an obligation to bargain with the Union because the proposed change had more than a *de minimis* effect on conditions of employment. *See PBGC*, 59 FLRA at 50. Absent any claim by the Respondent that the proposed change did not have more than a *de minimis* effect, we assume for purposes of this decision that there was an obligation to bargain on this basis.

As to the second inquiry -- whether the Respondent satisfied its bargaining obligation -- the Judge properly found that it did not, holding that the Union's proposal concerning the use of SABs at the GS-07 level and above was negotiable, and as such, the Respondent should have bargained with the Union to the extent required by the Statute. Judge's Decision at 19.

The Authority has found that proposals similar to the Union's proposal requiring that SABs be used to fill vacancies starting at the GS-07 level are negotiable. Simply requiring the use of rating and ranking panels in certain circumstances does not affect the exercise of management's rights and is within the duty to bargain. *NTEU,* 53 FLRA 539, 567 (1997) (citing *NTEU*, 46 FLRA 696, 778-79 (1992) (portion of proposal requiring that an evaluation board be used to fill vacancies in certain circumstances found to be a negotiable procedure under § 7106(b)(2))); *see also Local 2099*, 35 FLRA 362 (provision requiring that a panel be appointed to consider qualified candidates did not violate management's right to assign work because the provision did not require the assignment of specific duties to particular individuals). As proposals requiring the use of rating panels are negotiable, the Respondent's wholesale rejection of the Union's proposal was improper.

As Authority precedent holds that proposals requiring the use of rating panels in certain circumstances are negotiable, and as the Respondent failed to negotiate with the Union to the extent required by the Statute, its summary rejection of the Union's proposal and unilateral implementation of its desired instruction was improper. As noted above, if any pending union proposals are found to be negotiable, an agency will be found to have violated the Statute by implementing a change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *PBGC*, 59 FLRA at 50 (citation omitted). Based on the facts found by the Judge and Authority precedent, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute because the Respondent failed to bargain in good faith with the Union to the extent required by the Statute. We therefore deny the Respondent's exception. [2]

C. The Judge did not err in ordering a *status quo ante* remedy.

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *FCI,* 8 FLRA at 606. The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt the efficiency and effectiveness of the agency's operations. *United States Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000) (citing *FCI,* 8 FLRA at 606).

The appropriateness of a *status quo ante* remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852 (2002) (Member Pope dissenting as to remedy).

The Respondent contends that the Judge erred in ordering a *status quo ante* remedy. Specifically, the Respondent argues that the Judge erred in determining that the Respondent was "guilty of willful bargaining misconduct" because the Judge "never considered the negotiability of an actual proposal from the Union" since the Union never actually presented a negotiable proposal over which to bargain. Exceptions at 17-18.

As stated above, the Judge determined that the Union's proposal addressing the grade levels for which SABs would be utilized was negotiable. Judge's Decision at 19. In addition, the Judge found that the parties met on three occasions to negotiate the proposed revi-

2. In view of our finding of an unfair labor practice with regard to the Respondent's failure to bargain over whether SABs could be used to fill vacancies starting at the GS-07 level, it is unnecessary to consider the Respondent's remaining arguments in resolving the exception, including its argument regarding the negotiability of union participation on SABs.

sions to the SAB procedures, after which, and without reaching any type of agreement with the Union, the Respondent informed the Union that it would implement its "final version" of the new SAB instruction. *Id.* at 7. The Judge determined that the Respondent's conduct "failed to reflect a sincere desire to reach a mutual agreement[.]" *Id.* at 21-22. As the proposal was negotiable, and as the facts as found by the Judge demonstrate that the Respondent failed to bargain in good faith and to the extent required by the Statute with the Union over the proposal, the Respondent willfully failed to discharge its bargaining obligation.

The Respondent also contends that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations because the Respondent "would be forced to return to a procedure that was specifically found to interfere with management's rights[.]" Exceptions at 18. In this regard, the parties had, for years, been operating under an agreement that provided for the precise SAB procedures that the Respondent is now claiming would "disrupt . . . the efficiency and effectiveness" of the Respondent's operations. *See FCI,* 8 FLRA at 606. In addition, the Respondent does not present any evidence to substantiate such a claim. As such, we deny the Respondent's exception.

V. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the United States Department of the Navy, Naval Aviation Depot, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (Union), the exclusive representative of certain of its employees.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

(a) Rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

(b) Notify and, upon request, bargain with the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

(c) Post at its Jacksonville, Florida facility, a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Agency, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.